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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KIMOANH NGUYEN-LAM, Plaintiff and Respondent, v. SINH CUONG CAO, Defendant and Appellant.	G039206 (Super. Ct. No. 07CC02899) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Charles Margines, Judge. Affirmed.

John L. Dodd & Associates and John L. Dodd; Bucher & Palmer and Mark W. Bucher for Defendant and Appellant.

Donna Bader; Lents & Foley and Katrina Anne Foley for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part II, subsections E., F., and G.

Defendant Sinh Cuong Cao appeals from the trial court's order following a hearing on his strike motion under the anti-SLAPP statute, Code of Civil Procedure section 425.16 (all further unlabeled section references are to this code).[1] Concluding the evidence submitted by the parties for the hearing demonstrated a probability plaintiff Kimoanh Nguyen-Lam would prevail in establishing defendant slandered her with actual malice, the trial court authorized plaintiff to amend her complaint to plead actual malice. Plaintiff claimed that but for defendant's false accusation in a telephone conversation with Westminster School District (WSD) board members that she was a "Communist," and repeated republications of the false statement, the WSD school board (Board) would not have rescinded her appointment as the nation's first Vietnamese superintendent of a public school district.

Contending the amendment order amounted to a denial of his strike motion, defendant argues the trial court erred because (1) plaintiff failed to allege actual malice in her original complaint and the trial court erroneously permitted amendment; (2) the "Communist" epithet no longer constitutes slander per se; (3) given the absence of slander per se, plaintiff failed to demonstrate defendant's comment damaged her or injured her reputation; and (4) defendant's description of plaintiff as a "Communist" was not a provably false assertion of fact but rather "protected rhetorical hyperbole or loose language." (*Lam v. Ngo* (2001) 91 Cal.App.4th 832, 849 (*Lam*).)

Defendant also raises for the first time on appeal arguments not presented to the trial court: (1) his statements fell within the *Noerr-Pennington* doctrine applicable when petitioning one's elected representatives, and (2) his statements were shielded by the absolute privilege afforded petitioning activity under Civil Code section 47,

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[1] "A plethora of appellate litigation has made the SLAPP acronym a household word — at least in legal households. SLAPP stands for strategic lawsuit against public participation . . . ." (*Paterno v. Superior Court* (2008) 163 Cal.App.4th 1342, 1345, fn. 1.)

subdivision (b)(1), for communications concerning legislative proceedings. Finally, while defendant's motion to strike did not challenge plaintiff's causes of action for intentional interference with contractual relations, or intentional or negligent interference with prospective economic advantage, defendant asserts the trial court erroneously denied his strike motion as to those claims because he later attacked them in a supplemental reply.

In the published portion of this opinion, we conclude the trial court properly authorized plaintiff to amend her complaint to plead actual malice as reflected in the parties' evidentiary submissions for the strike motion. Where the evidence submitted for the motion enables the plaintiff to demonstrate the requisite probability of prevailing on the merits of her defamation claim, the policy concerns against amendment in the anti-SLAPP context do not apply because the plaintiff's suit — shown to be likely meritorious — is not a strategic lawsuit against public participation. In the unpublished portion of the opinion, we explain defendant's other contentions are without merit or forfeited, and we therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

After applying for the position of Westminster's superintendent of public schools, plaintiff advanced through three rounds of interviews. The Board members conducted the first round on May 16, 2006, the members of the teacher's union interviewed candidates the next week, and the Board members conducted a final round a week later. Plaintiff competed with 15 other applicants.

WSD held focus group interviews to develop a profile of the "ideal superintendent by interviewing the Board, the district staff, the teacher['s] union, the city council members in the district, the police departments, and the parents and community members."

Board President Blossie Marquez opined that "[b]ased on my review of Dr. Nguyen-Lam's experience, credentials, and cultural background, she was qualified for the WSD [s]uperintendent position."

On May 23, 2006, the Board voted 4-1 in favor of plaintiff as its next superintendent. Board member Jo-Ann Purcell dissented. Marquez called plaintiff to congratulate her that evening and gave her the official news. The interim superintendent, Dr. Mel Lopez, also called to congratulate her.

WSD issued a press release announcing plaintiff's superintendent appointment. Local television stations and major newspapers picked up the story because plaintiff would become the first Vietnamese person hired in America as a superintendent of a public school system. She would begin her three-year term on July 1, 2006, a little more than a month later. The next day, plaintiff resigned her administrative position at California State University, Long Beach.

On May 27, 2006, claiming she had been "investigating" plaintiff, Board member Judy Ahrens called Marquez at her home. The call was placed from defendant's business. Announcing, "I know someone who knows all about Dr. Nguyen-Lam," Ahrens placed defendant on the line. According to Marquez, defendant "spoke to me and maliciously accused Dr. Nguyen-Lam of being a Communist, inexperienced, and unqualified for the position." Ahrens then advised Marquez, "'You have to listen to this guy.'"

In his initial declaration submitted for the anti-SLAPP hearing, defendant admitted that at the time he made these statements, he never had met plaintiff, and only knew about her through media reports as a Garden Grove school board member and "community activist," as well as articles she might have published in the newspaper.

Defendant admitted he talked to Ahrens and Marquez about the decision to hire plaintiff; however, defendant insisted he merely gave his "opinion" of plaintiff.

In his second declaration, filed with his reply in the anti-SLAPP proceeding, defendant denied stating plaintiff was a Communist, inexperienced, or unqualified. On the contrary, he claimed, "[my] only complaint about Dr. Nguyen-Lam is that, according to my understanding, her political views are far less conservative than my own." Defendant also insisted he was merely sharing his opinion and never encouraged anyone to change their vote.

Plaintiff explained in her declaration that calling someone a "Communist" in Westminster's "Little Saigon" Vietnamese community was "extremely harmful to [her] reputation." While the statements were not made to Vietnamese individuals, they were made to Board members necessarily attuned by demographics to the concerns of Vietnamese-American voters.

Less than a week after plaintiff's appointment, the Board met and voted 3-2 to terminate her as superintendent. Board members Ahrens and Jim Reed changed their votes while Purcell again dissented. Marquez and Sergio Contreras continued to support plaintiff.

Plaintiff subsequently filed a lawsuit against the school district and others, including defendant. Plaintiff named defendant in the following causes of action: defamation (Seventh Cause of Action), intentional interference with contractual relations (Ninth Cause of Action), intentional interference with prospective economic advantage (Tenth Cause of Action), and negligent interference with prospective economic advantage (Eleventh Cause of Action).

Defendant filed an answer to the complaint, listing numerous affirmative defenses; however, he did not assert any privileges. A few days later, defendant filed his anti-SLAPP motion, contending any statements he made were pursuant to his right to free speech and to petition the government. He asserted plaintiff was a public official and her appointment as superintendent was a matter of public interest. Defendant explained he formed an "opinion" about plaintiff, which he shared with others because of his interest in Vietnamese community affairs and local politics. He argued plaintiff's suit punished him for expressing his political opinion.

Other than listing the causes of action in his notice of motion, defendant did not further address why the trial court should strike the ninth, tenth, or eleventh causes of action. Plaintiff's opposition argued the anti-SLAPP statute did not apply because defendant did not make his comments in a public forum on a pending matter. Plaintiff explained she was past the hiring phase and the matter was no longer under review. Moreover, defendant made his statements privately either by telephone or at his office, in a manner she had no opportunity to dispute before the Board acted on them. Plaintiff denied she was ever a Communist.

In his reply, defendant claimed any statements he may have made simply illustrated his political differences with plaintiff and amounted to an expression of his opinion, not an assertion of fact. In his second declaration, which he attached to his reply, defendant denied stating plaintiff was a "Communist," but opined her political beliefs were more liberal than his.

Seven days later, defendant filed a short "Supplemental Reply," in which he attempted to address the ninth, tenth, and eleventh causes of action. On August 1, 2007, the trial court heard the motion, noting defendant failed to address the ninth, tenth,

and eleventh causes of action in his moving papers, and found defendant's attempt to do so in his reply improper.

Addressing the existence of "actual malice," the trial court stated: "But isn't the proof in your client's own declaration where he says he doesn't even know this lady? And nowhere does he say, 'I learned she is a Communist from this source or that source or from her own words.' If you put both of those together, what do you have? You have no place to go for his belief that she's a Communist."

The next day, the trial court asked for briefs from both parties as to whether plaintiff could amend her complaint to allege actual malice. Following further briefing, the court granted leave for plaintiff to amend her complaint and effectively denied defendant's anti-SLAPP motion. The trial court found the matter was one of public interest under the anti-SLAPP statute; however, plaintiff had established a probability of prevailing on her defamation claim. The trial court denied defendant's anti-SLAPP motion as to the ninth, tenth, and eleventh causes of action because defendant failed to address them in his moving papers. The court found the complaint was deficient on its face in alleging actual malice, but determined plaintiff had provided proof of actual malice and authorized plaintiff to amend the complaint accordingly. The court concluded plaintiff had demonstrated a probability of prevailing on her claim that defendant falsely and maliciously branded her a "Communist," uttered as a statement of fact "without a belief in its truth."

II

DISCUSSION

A. *Governing Anti-SLAPP Principles*

"The anti-SLAPP statute arose from the Legislature's recognition that SLAPP suit plaintiffs are not seeking to succeed on the merits, but to use the legal system to chill the defendant's first amendment right of free speech." (*Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal.App.4th 515, 522 (*Integrated Healthcare*).) "To prevail on an anti-SLAPP motion, the movant must first make '"a threshold showing that the challenged cause of action" arises from an act in furtherance of the right of petition or free speech in connection with a public issue.' [Citation.] Once the movant meets this burden, the plaintiff must demonstrate '"a probability of prevailing on the claim."' [Citation.] If the plaintiff cannot meet this burden, the trial court must strike the cause of action. [Citation.]" (*Ibid.*)

The trial court concluded defendant satisfied the first prong because plaintiff's appointment as superintendent remained "an issue of public interest that moving party was free to comment on." Defendant challenges the trial court's analysis on the second prong. We review the trial court's order de novo. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 79 (*Christian Research*).)

Defendant contends the trial court erred in concluding plaintiff demonstrated a probability of prevailing on the merits of her slander claim. "To establish a probability of prevailing, the plaintiff '"must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."' [Citation.] In doing so, the trial court considers the pleadings and evidentiary submissions of both the

plaintiff and the defendant. [Citation.] Although 'the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.' [Citation.] Moreover, the plaintiff cannot rely on the allegations of the complaint, but must produce evidence that would be admissible at trial. [Citation.]" (*Integrated Healthcare*, *supra*, 140 Cal.App.4th at p. 527.)

B. *Slander*

Slander is a species of defamation. "Defamation constitutes an injury to reputation; the injury may occur by means of libel or slander. [Citation.] . . . [Citations.] A false and unprivileged *oral* communication attributing to a person specific misdeeds or certain unfavorable characteristics or qualities, or uttering certain other derogatory statements regarding a person, constitutes slander." (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1242.) In addition to false statements that cause actual damage (Civ. Code, § 46, subd. 5), the Legislature has specified that slander includes a false statement that: "1. Charges any person with crime, or with having been indicted, convicted, or punished for crime; [¶] 2. Imputes in him the present existence of an infectious, contagious, or loathsome disease; [¶] 3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural

tendency to lessen its profits; [or] [¶] 4. Imputes to him impotence or a want of chastity . . . ." [2] (Civ. Code, § 46, subds. 1-4.)

Defendant asserts plaintiff, a public figure, inadequately alleged slander in her complaint. Plaintiff concedes that as Westminster's new superintendent, albeit briefly, she was a public figure. We agree. (See *Ghafur v. Bernstein* (2005) 131 Cal.App.4th 1230, 1238-1239 ["strong public interest in ensuring open discussion" of superintendent's "fitness for the position" commands "universal agreement" that such persons are public figures]; cf. also *Conroy v. Spitzer* (1999) 70 Cal.App.4th 1446, 1451 [candidates for public office are public figures].) As such, plaintiff shouldered the burden of proving not only the falsity of the challenged statement, but also that defendant acted with "actual malice." (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 280 (*New York Times*).)

To show actual malice, a public figure must demonstrate the defendant uttered the statement "with knowledge that it was false or with reckless disregard of whether it was false or not." (*New York Times, supra*, 376 U.S. at pp. 279-280; see *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 511 [defendant must have known statement was false or subjectively entertained serious doubt about its truth].) A public figure plaintiff must prove actual malice by clear and convincing evidence. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 342.)

Plaintiff's original complaint unequivocally asserted defendant's statement that she was a "Communist" was "false." But whether she alleged defendant knew the statement was false or uttered it with reckless disregard for the truth is a closer call.

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[2] Because a plaintiff need not show actual damages under Civil Code section 46, subdivisions 1 through 4, these varieties of slander are known as slander per se.

According to defendant, plaintiff failed to allege he uttered his statements with the actual malice necessary to constitute slander of a public figure.

C. *Actual Malice*

Plaintiff's complaint alleged defendant repeatedly called her a Communist "for malicious purposes," "to get her fired [and] justify her wrongful termination . . . ." Quoting Civil Code section 45, the complaint further alleged defendant made the statements intending to subject her to "contempt, ridicule, hatred, [and] obloquy, . . . or [to] cause her to be shunned and avoided." Defendant points out that plaintiff's quotation derives from the libel statute (Civ. Code, § 45), not the slander code section (Civ. Code, § 46). But this is a distinction without a difference if plaintiff conveyed that defendant acted with anger and hostility toward her, which may support an inference of actual malice. (See *Christian Research, supra,* 148 Cal.App.4th at pp. 84-85 ["'anger and hostility toward the plaintiff . . . may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication'"].)

Plaintiff alleged that defendant made his statements "with intent, malice, fraud, or oppression, and in reckless disregard of [p]laintiff's rights." True, one court has held similar language — that the defendant acted "'maliciously and oppressively, and in conscious disregard of [plaintiff's] rights'" — insufficient "to state a cause of action in a case where 'actual malice' . . . is required." (*Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1018, relying on *Noonan v. Rousselot* (1966) 239 Cal.App.2d 447, 453, fn. 5, 452-454 [upholding demurrer aimed at similar language after plaintiff failed twice to amend complaint to plead actual malice].)

But we need not resolve whether plaintiff adequately alleged actual malice in her original complaint because facts probative of actual malice emerged through the

evidence the parties submitted for the hearing on the strike motion. Plaintiff's evidence suggested defendant held himself out as having inside knowledge about plaintiff, i.e., Ahrens put him on the line with Marquez because he "'knows all about Dr. Nguyen-Lam.'" But defendant admitted in his first declaration he had never met plaintiff and knew of her only through media reports. Nothing in those reports hinted she was a Communist. Consequently, the trial court could reasonably conclude that because defendant had no basis for his claim plaintiff was a Communist, a jury could reasonably determine he lied in leveling the charge against her and, moreover, infer malice from the lie.

As the trial court put it at the hearing: "[I]sn't the proof in your client's own declaration where he says he doesn't even know this lady? And nowhere does he say, 'I learned she is a Communist from this source or that source or from her own words.' If you put both of those together, what do you have? You have no place to go for his belief that she's a Communist." As the trial court correctly understood, "malice may be inferred where, for example, 'a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call.' [Citation.]" (*Christian Research, supra,* 148 Cal.App.4th at p. 85.)

"Similarly, an inference of malice may be drawn 'when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation[,] . . . [or] where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. . . .'" (*Christian Research, supra,* 148 Cal.App.4th at p. 85.) On this score, plaintiff's opposition suggested defendant, a fellow Vietnamese immigrant, should have known that since the articles about her disclosed she fled Vietnam to take refuge in the United States in 1975, it was improbable

she would be a Communist, yet he hurled the epithet anyway, despite "the harm that would result f[rom] such accusations" in Westminster. As plaintiff points out, while defendant did not make his statements to Vietnamese individuals, "they were certainly made to Board members who had to answer to a heavily Vietnamese population." In sum, the trial court did not err in concluding plaintiff demonstrated the requisite probability a jury would find defendant's baseless accusations and contradictory explanations constituted clear and convincing evidence he harbored actual malice.

D. *Amendment*

Defendant contests the trial court's order authorizing plaintiff to amend her complaint with the foregoing facts presented at the anti-SLAPP hearing. The trial court couched its ruling as an order granting defendant's motion to strike, but with leave for plaintiff to amend her complaint to cure any deficiency concerning actual malice. Pending this appeal, plaintiff has not filed her amended complaint, nor did she appeal the trial court's order granting the strike motion. Nevertheless, we conclude the trial court's ruling is properly before us. A plaintiff authorized to amend would have — as exemplified here — no incentive to appeal an order granting the strike motion. But authorizing an amendment under these circumstances is tantamount to denying the strike motion, and we therefore reach the propriety of the ruling based on defendant's challenge. (§ 425.16, subd. (i) [orders granting or denying strike motion are appealable].)

Defendant relies on *Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068 (*Simmons*) for the proposition that a complaint may not be amended after a motion to strike is filed, but we find *Simmons* inapposite. In *Simmons*, Allstate sued a chiropractor and his related business entities for unfair business practices based on an insurance scam involving fraudulent medical bills, unnecessary treatments, and other

misdeeds. When Simmons cross-complained alleging defamation, Allstate brought an anti-SLAPP motion to strike showing the allegedly defamatory statements "arose out of statements in connection with issues under consideration by a judicial or executive body, as well as issues of public interest." (*Simmons*, at p. 1071.) Specifically, the statements were related to or made at an ongoing state disciplinary action against Simmons. At the hearing on the motion, Simmons sought leave to amend the cross-complaint to pare allegations bringing it within the scope of the anti-SLAPP statute. (*Id.* at p. 1073.) Simmons argued leave to amend should be liberally granted, comparing the strike process to a demurrer.

The trial court denied leave to amend, which the appellate court upheld on grounds that an anti-SLAPP motion is more like a summary judgment motion than a demurrer because of the evidentiary showing required and the shifting burdens. (*Simmons*, *supra*, 92 Cal.App.4th at p. 1073; accord, *Lam*, *supra*, 91 Cal.App.4th at p. 843 [noting strike motion is "akin to a summary judgment motion"].) Observing the anti-SLAPP statute made no express provision for amendments, the *Simmons* court concluded permitting an amendment to thwart the defendant's initial prima facie showing of protected activity would undermine section 425.16's "quick dismissal remedy." (*Simmons*, at p. 1073.) The court explained: "Instead of having to show a probability of success on the merits, the SLAPP plaintiff would be able to go back to the drawing board with a second opportunity to disguise the vexatious nature of the suit through more artful pleading. . . . [¶] By the time the moving party would be able to dig out of this procedural quagmire, the SLAPP plaintiff will have succeeded in [the] goal of delay and distraction and running up the costs of his opponent." (*Ibid.*)

Simmons is inapposite. Unlike the plaintiff in *Simmons*, in seeking amendment here plaintiff did not attempt to void defendant's showing on the first prong of the anti-SLAPP inquiry. Specifically, plaintiff's amendment had nothing to do with defendant's assertion his statements were made in connection with his right of petition or free speech. Rather, assuming that showing had been made, and in conjunction with her burden on the second prong to show a probability of prevailing on the merits, plaintiff sought to amend the complaint to plead specifically that defendant harbored the requisite actual malice as shown by the evidence presented for the hearing on the strike motion.

As *Simmons* noted, the anti-SLAPP statute is silent on the question of amendment. Our purpose in construing section 425.16 is to discern and effectuate the Legislature's intent. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1118.) Consequently, we look to "'the statute as a whole, which includes the particular directives.'" (*Ibid.*) Those directives include the requirement that the parties may not rely merely on pleadings or argument in supporting or opposing the motion, but must present facts in the form of affidavits. (§ 425.16, subd. (b)(2); *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 211-212 [plaintiff must make prima facie showing of facts establishing probability plaintiff will prevail].) Additionally, "although discovery is stayed until the notice of entry of the order ruling on the motion, discovery may be conducted if good cause is shown, and such discovery is limited to the issues raised in the special motion to strike." (*Slauson Partnership v. Ochoa* (2003) 112 Cal.App.4th 1005, 1021 (*Slauson*); see *Paterno, supra*, 163 Cal.App.4th at pp. 1345-1346; § 425.16, subd. (g).) Accordingly, the *Slauson* court concluded "nothing in the statute or case law suggests that the factual analysis for ruling on the motion must be frozen in time on the date the complaint is filed." (*Slauson*, at p. 1021.) We agree.

The purpose of section 425.16 is to unmask SLAPP actions "'masquerad[ing] as ordinary lawsuits[.]'" (*Kajima Engineering & Const., Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 927.) As *Simmons* observed, "In enacting the anti-SLAPP statute, the Legislature set up a mechanism through which complaints that arise from the exercise of free speech rights 'can be evaluated at an early stage of the litigation process' and resolved expeditiously. [Citation.] Section 425.16 is just one of several California statutes that provide 'a procedure for exposing and dismissing certain causes of action lacking merit.' [Citation.]" (*Simmons, supra*, 92 Cal.App.4th at p. 1073.) By definition, however, when the plaintiff demonstrates a probability of prevailing on the merits, his or her complaint is not a SLAPP. With nothing to unmask, the policy concerns implicated by the anti-SLAPP statute dissipate, and the action proceeds as an ordinary lawsuit.

True, a plaintiff may not avoid or frustrate a hearing on the anti-SLAPP motion by filing an amended complaint (*Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049) but where, as here, the evidence prompting amendment is found in the declarations already submitted for the hearing, there is no risk the purpose of the strike procedure will be thwarted with delay, distraction, or increased costs. (Compare *ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc.* (2006) 138 Cal.App.4th 1307, 1323 [plaintiff cannot amend pleading to avoid pending anti-SLAPP motion]; *Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 772) [plaintiff cannot use "eleventh-hour amendment" to plead around anti-SLAPP motion].)

Simmons rightly foresaw a "procedural quagmire" in allowing amendment to defeat the movant's showing on the first prong of the anti-SLAPP statute. (*Simmons, supra*, 92 Cal.App.4th at p. 1073.) Amendment in that circumstance would necessitate "a

fresh motion to strike," triggering "inevitably another request for leave to amend," and thereby abetting the SLAPP plaintiff "in his goal of delay and distraction and running up the costs of his opponent. [Citation.] Such a plaintiff would accomplish indirectly what could not be accomplished directly, i.e., depleting the defendant's energy and draining his or her resources. [Citation.] This would totally frustrate the Legislature's objective of providing a quick and inexpensive method for unmasking and dismissing such suits. [Citation.]" (*Simmons, supra*, 92 Cal.App.4th at pp. 1073-1074.) But the concerns expressed in *Simmons* are not implicated where the plaintiff's request for amendment to meet her burden on the second prong proceeds from timely submitted facts already before the court. In such cases, there is no need for a "fresh motion to strike" (*Simmons, supra*, 92 Cal.App.4th at p. 1073); rather, the trial court need only rule on the motion and facts already under consideration.

To the extent *Simmons* suggests section 425.16 erects an absolute bar to amendment, we disagree and find *Slauson*'s analysis more persuasive. In *Slauson*, a pastor, Ochoa, sought to shut down an adult entertainment strip club through protests by his congregation and other persons outside the business, located in a small shopping center. (*Slauson, supra*, 112 Cal.App.4th at p. 1009.) The club and its landlord filed suit to bar the protesters from the shopping center, and Ochoa responded with an anti-SLAPP motion to strike. Several months before the hearing on the motion, the parties stipulated to a temporary injunction authorizing the protestors to use a private sidewalk near the club, but limiting the number of protesters and confining their activity to "'normal polite protest conduct'" without bullhorns, shouting or sitting, and no physical contact with the club's employees or patrons. (*Id.* at pp. 1014-1015.) The injunction did not restrict protestors' activities on public sidewalks further away from the club.

Seeking to modify the injunction, plaintiffs submitted evidence showing the protestors violated the injunction by marching within eight feet of the club, gathering in the parking lot, congregating in numbers beyond the stipulated agreement, yelling and blowing loud whistles, continuing the protest beyond midnight, and engaging in harassing conduct, including placing video cameras on the private sidewalk with signs stating, "'You are being videotaped, it can be used against you in a court of law.'" (*Slauson*, *supra*, 112 Cal.App.4th at p. 1015.)

The trial court heard the motion to strike before reaching plaintiffs' request to modify the injunction but, in denying the motion, relied on plaintiffs' evidence concerning violations of the injunction. On appeal from the denial of his motion, Ochoa argued consideration of the protestors' postcomplaint activities amounted to amendment of the complaint prohibited by *Simmons*. *Slauson* pointed out, however, that although the plaintiffs had not utilized discovery procedures to obtain evidence showing the protesters violated the injunction, the discovery provision in section 425.16, subdivision (g), demonstrated "further development of the factual record is contemplated by the anti-SLAPP statute, and not expressly prohibited by it . . . ." (*Slauson*, *supra*, 112 Cal.App.4th at p. 1021.) Accordingly, the *Slauson* court concluded "it was not error for the trial court to rely on evidence of events occurring subsequent to the filing of the complaint." (*Id.* at pp. 1021-1022.)

Here, plaintiff demonstrated a probability of prevailing at trial if she could amend her complaint. As the trial court observed, "Disallowing an amendment would permit defendant to gain an undeserved victory, undeserved because it was not what the Legislature intended when it enacted the anti-SLAPP statute." The Legislature declared its purpose in enacting section 425.16 was to protect "the *valid* exercise of the

constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a), italics added.) But false statements uttered with actual malice serve no public interest, and where the strike opponent has demonstrated the requisite probability of success in showing such malice, as here, her complaint falls outside the purpose of the anti-SLAPP statute — indeed, it is not a SLAPP suit at all. Simply put, the Legislature did not intend to shield statements shown to be malicious with an unwritten bar on amendment in the circumstances here. Consequently, the trial court did not err in permitting plaintiff to amend her complaint to plead actual malice in conformity with the proof presented at the hearing on the strike motion.

E. *The "Communist" Accusation*

1. Per se Damages versus Actual Damages and Causation

Defendant argues plaintiff failed to show his accusation she was a "Communist" injured her, and therefore failed to demonstrate a probability of prevailing on her slander claim. Observing the Legislature has specifically forbidden discrimination in school hiring on the basis of political belief (Ed. Code, § 7057), defendant discounts as outdated plaintiff's authority that falsely branding an adversary a Communist is per se defamatory. (See, e.g., *MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 546 ["Whatever the rule may have been when anticommunist sentiment was less crystallized than it is today [citations] . . . a charge of membership in the Communist Party or communist affiliation or sympathy is libelous on its face"]; *Joopanenko v. Gavagan* (Fla. 1953) 67 So.2d 434, 438 ["It is difficult for us to conceive of any words or charge which would be more slanderous per se than the words used in this case," i.e., "'Don't let that man speak, I know[] him and he is a Communist'"].) Defendant contends that in the present day, the Communist label cannot amount to slander per se because it does not

"imput[e] . . . general disqualification in those respects which the office or other occupation peculiarly requires . . . ." (Civ. Code, § 46, subd. 3.) Defendant would have us understand that the multitude of cases cited by plaintiff "must be considered in the context of the times," but he maintains we must ignore the context of his statements — specifically, Westminster and its Little Saigon enclave, where we have observed "the word 'Communist' has some real sting in the Vietnamese community in Orange County, California." (*Lam*, *supra*, 91 Cal.App.4th at p. 850.)

In any event, even assuming arguendo that defendant is correct the Communist epithet should no longer be deemed slander per se, plaintiff demonstrated actual damages (Civ. Code, § 46, subd. 5) — she lost her job. Defendant argues no proximate cause connects his comments with her alleged damages stemming from termination, but the trial court could reasonably conclude a jury would see clear and convincing evidence of a link in the Board's abrupt about-face on her appointment, first terminating her with no explanation and then offering what a reasonable factfinder could find was a pretextual attack on her qualifications.

Defendant asks that we take judicial notice of Board minutes purportedly demonstrating that upon her appointment plaintiff's contract terms remained to be negotiated and were never finalized, rendering her damages speculative. But we do not view the *amount* of damages, if any, as relevant at this stage in the proceedings. The relevant fact is that the Board appointed plaintiff superintendent, a prestigious position in plaintiff's field of education; consequently, *whether* she was damaged in having that plum appointment snatched away is not at all speculative. Defendant seems to posit that because the parties had not agreed on the details in plaintiff's contract, it remained possible the parties would have a falling out, thereby scuttling the appointment over

contract terms and not because of anything defendant said. *That* is sheer speculation; defendant identifies no unusual potential contract terms that would pose a stumbling block for either party. We therefore deny as irrelevant defendant's request for judicial notice concerning the as-yet-unspecified contract terms.

Defendant suggests there was no evidence the Board members put any stock in defendant's "Communist" charge, and therefore the charge did not damage her. He notes none of the Board members were Vietnamese, implying none were particularly susceptible to outrage over the charge. He points out that two of the members, Blossie Marquez and Sergio Contreras, remained steadfast in supporting her. On the issue of causation, however, the question is not whether the Board members who changed their votes, Ahrens and Reed, *believed* defendant's false accusation, but whether they were willing to *risk* constituent unrest over the issue in their heavily Vietnamese-American district. A reasonable jury could conclude the change in votes demonstrated the risk was too great for the Board to tolerate, and therefore defendant's false accusation injured plaintiff. Specifically, the accusation transformed plaintiff into damaged goods in the Board's eyes and rescission of plaintiff's appointment — proximately caused by defendant's false accusation — further damaged her reputation. As damage to reputation is the gravamen of slander (*Flynn v. Highan* (1983) 149 Cal.App.3d 677, 681), plaintiff more than adequately demonstrated a probability of prevailing on her slander claim.

Because defendant's "Communist" statement furnished adequate grounds to keep plaintiff's defamation claim viable in the face of defendant's strike motion, we need not evaluate defendant's other alleged statements asserting plaintiff was "unqualified" and "inexperienced." As defendant recognizes, "the 'communist' allegation was the primary focus of the proceedings below . . . ." Indeed, defendant

failed to raise the "unqualified" or "inexperienced" statements in his motion to strike, and therefore the trial court did not evaluate them. We express no opinion on whether these statements independently support a claim for slander in the context here.

2. Whether the "Communist" Accusation Was Provably False

a. Governing Law Concerning Actionable "Opinions"

Relying on *Lam*, defendant asserts that if he called plaintiff a "Communist" it was a matter of opinion, not provably false. In *Lam*, demonstrators protested in front of Garden Grove City Council Member Tom Lam's restaurant because they felt he had not been sufficiently vocal in his support for their campaign against a video store operator who had "placed the flag of the North Vietnamese communists and a poster of Ho Chi Minh in [his] window." (*Lam*, *supra*, 91 Cal.App.4th at p. 837.) "[T]hroughout the protests, demonstrators bore numerous signs casting Lam as a communist and a traitor. They carried drawings of Lam as a horned and fanged devil with blood dripping down his mouth. They crafted a life-sized effigy of Lam tied to a gallows next to a life-sized effigy of Ho Chi Minh; a bloody axe bearing a South Vietnamese flag, a coffin-like box, and the slogan 'Down with the Communists' adorned their creation. The protesters also created three-dimensional effigies of Lam and Ho Chi Minh in lewd sexual positions across the street from the restaurant." (*Id.* at p. 838.) Lam responded with a defamation claim against one of the protest organizers and against the protesters as Doe defendants.

But as we explained there, the charge that Lam was a communist sympathizer was not actionable because, in the context of the demonstrations, "[c]harges of communism are part of the heat of the political kitchen" when "they constitute[] protected rhetorical hyperbole or loose language." (*Lam*, *supra*, 91 Cal.App.4th at p. 849.) We concluded: "The protesters were not accusing Lam, like Chambers vis-à-vis

Hiss, of being an actual member of a secret Communist cell. (See *Nat. Assn., Etc. v. Central Broadcasting* [1979] 396 N.E.2d [996,] 1002 [there is a difference between charging a person with '"communism"' and 'charging him specifically with being "a member of the Communist Party"'].) In context, their statements were not susceptible to verification using a falsifiability test." (*Lam*, *supra*, 91 Cal.App.4th at p. 850.)

Our holding in *Lam* followed ineluctably from Supreme Court precedent in *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1 (*Milkovich*). *Milkovich* "[f]oremost . . . stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law . . . ." (*Id.* at p. 19.) In *Milkovich*, the high court clarified that while there is not "an additional separate constitutional privilege for 'opinion'" (*id.* at p. 21), statements "that cannot 'reasonably [be] interpreted as stating actual facts' about an individual" enjoy First Amendment protection. (*Id.* at p. 20.) Thus, a defamation claim is barred where "'rhetorical hyperbole'" (*ibid.*) or "loose, figurative, or hyperbolic language" would "negate the impression . . . the writer was seriously maintaining" a proposition that was "sufficiently factual to be susceptible of being proved true or false." (*Id.* at p. 21.)

As we explained in *Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375 (*Franklin*), "In determining whether disparaging remarks are actionable defamation, "'the question is not strictly whether the published statement is fact or opinion. Rather, the dispositive question is whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact.' [Citationw.]" (*Id.* at p. 385.) In other words, an opinion or legal conclusion is actionable only "'"if it could reasonably be understood as declaring or implying actual facts capable of being proved true or false."' [Citation.] Thus, an opinion based on implied,

undisclosed facts is actionable if the speaker has no factual basis for the opinion. [Citation.]" (*Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456, 1471 (*Ruiz*).)

"Whether a statement declares or implies a provably false assertion of fact is a question of law for the court to decide [citations], unless the statement is susceptible of both an innocent and a libelous meaning, in which case the jury must decide how the statement was understood." (*Franklin*, *supra*, 116 Cal.App.4th at p. 385.) "In determining whether a statement is actionable opinion, we examine the totality of the circumstances, starting with the language of the allegedly defamatory statement itself." (*Ruiz*, *supra*, 134 Cal.App.4th at p. 1471.)

b. Defendant's Statements; Context of the Statements

Here, according to Marquez's declaration, defendant accused plaintiff in a telephone call to Marquez "of being a Communist, inexperienced, and unqualified for the position." The context of the call invited all who learned of it to take the accusations seriously. Specifically, fellow Board member Ahrens initiated the call to Marquez, explaining, according to Marquez, that she "had been investigating Dr. Nguyen-Lam's background." Introducing defendant as "someone who knows all about Dr. Nguyen-Lam," Ahrens placed defendant on the line and, after he made his accusations, Ahrens returned to the line to exhort Marquez, "You have to listen to this guy." Defendant's declaration revealed that, like plaintiff, he had immigrated from Vietnam.

According to plaintiff's complaint, the accusations against her spread wildly and grew to include other charges. "All of a sudden, a small group of people began to viciously attack Dr. Nguyen-Lam's character. They spread outrageous false statements that she is a 'Communist,' called her a 'hardcore Democrat,' and criticized her

as a 'gay and lesbian lover.'" Plaintiff alleged defendant and City Councilman Kermit Marsh published the statements, and that Board members Purcell, Ahrens, and Reed joined them in "defam[ing] her by publishing statements that she was inexperienced and unqualified, a 'communist,' and by publishing many other false statements . . . ."

Defendant noted in her complaint that, upon her appointment, she received congratulatory messages from, among other places, Vietnam. She explained in her declaration: "I immigrated to the United States from Vietnam in 1975 to escape the communist regime engulfing the war-torn country. I am not a Communist and have never held any Communist ideals. When [d]efendant Cao spread rumors that I was a 'communist,' it was extremely harmful to my reputation. Due to the fact that Vietnam is currently a communist regime, and historical reasons such as America's involvement in the Vietnam war, people in this country often unfairly associate Vietnamese immigrants with Communism. People are less forgiving and more likely to believe this communist accusation simply because I am Vietnamese." According to defendant's declaration, he immigrated in 1989; he did not state whether he remained in contact with anyone from Vietnam.

c. Analysis

As we noted in *Ruiz*, "an opinion based on implied, undisclosed facts is actionable if the speaker has no factual basis for the opinion. [Citation.]" (*Ruiz*, *supra*, 134 Cal.App.4th at p. 1471.) Thus, "'[t]he statement, "I think Jones is an alcoholic," for example, is an expression of opinion based on implied facts, [citation], because the statement "gives rise to the inference that there are undisclosed facts that justify the forming of the opinion," [citation]. Readers of this statement will reasonably understand the author to be implying he knows facts supporting his view — *e.g.*, that Jones stops at a

bar every night after work and has three martinis. If the speaker has no such factual basis for his assertion, the statement is actionable, even though phrased in terms of the author's personal belief.'" (*Franklin*, *supra*, 116 Cal.App.4th at p. 387.) So it is here.

A jury could reasonably conclude defendant's repeated assertions plaintiff "is a 'Communist'" implied he knew facts supporting his view. This is particularly true here since defendant and plaintiff had both immigrated from Vietnam to Westminster's close-knit Little Saigon community and could infer from Ahrens's introduction that defendant cast himself to others as "'know[ing] all about Dr. Nguyen-Lam.'"

Defendant protests that the word, "Communist," has "no specific meaning" as a political epithet and is therefore too "'imprecis[e]'" to be provably false. Defendant argues we should consider the epithet as a strictly hyperbolic, political aspersion. But, as noted, the context of the statement implies a factual predicate. Simply put, defendant's accusation, in context, implied plaintiff maintained definite, meaningful, and personal ties — perhaps social, familial, political, or ideological — with communist Vietnam sufficient to brand her a "Communist" and thus render her "unqualified" in the hearts and minds of Westminster's substantial Vietnamese population to superintend their children. Falsely poisoning the community well against a person is precisely the injury to reputation the defamation tort redresses.

Here, unlike in *Lam*, there were no North or South Vietnamese flags, pictures of Ho Chi Minh, or grotesque, exaggerated drawings or effigies to signal unmistakably hyperbolic, political speech. (*Lam*, *supra*, 91 Cal.App.4th at p. 838.) In *Lam*, the councilman's putative connection to communism was apparently, for the hostile crowd, a sin of omission — failing to condemn a poster and a flag in a storefront. (*Id.* at p. 837.) Here, in contrast, defendant's charge that plaintiff was a communist tended

much further into the spectrum of the factual and provably false. Introduced as part of a Board member's "investigati[on]" into plaintiff's background and as someone who knew "'all about'" plaintiff and, furthermore, as a fellow immigrant from communist Vietnam, defendant leveraged an aura of inside information that made the implied basis for his charge of communism more definite, significant, and personal than in *Lam*, and thus more likely to be understood as factual and therefore provably true or false.

The contextual link to Vietnamese communism, a flashpoint of intense community concern as demonstrated by our opinion in *Lam*, distinguishes defendant's authorities. Defendant relies on the concurring opinion in *Turner v. Devlin* (Ariz. 1993) 848 P.2d 286 (*Turner*), which found that "[c]alling someone a communist . . . is not likely to be understood as factual. It is likely to be understood as ideological rhetoric. And if that were not enough, how can it be said that being a communist is provably false? What litmus test does one use to test the label? Marx? Engles? Lenin? Gorbachev? Sartre? Kazantzakis?" (*Id.* at pp. 295-296, conc. opn. of Martone, J.)

The majority in *Turner*, however, sensibly observed cases must be decided on their particular facts, which in their unending variety may conceivably include a specific, factual charge of Communism. The majority needed to look no further than its earlier decision in *Yetman v. English* (Ariz. 1991) 811 P.2d 323, where "the record revealed that: (1) the defendant intended his ["Communist"] comment to be factual; (2) a newspaper reporter interpreted the statement as an assertion of fact; and (3) there was expert testimony that the statement was susceptible to the interpretation that [plaintiff] was actually a communist." (*Turner*, *supra*, 848 P.2d at p. 293, fn. 9.) Thus, contrary to defendant's assertion, there are uses of the Communist epithet meant to be taken as factual and therefore provably false. A speaker does not immunize himself, as defendant

suggests, merely by refraining from patently factual claims such as labeling another "a Communist spy," "a card-carrying member of the Communist Party U.S.A.," or "a member of a Communist cell."

Similarly, defendant misplaces his reliance on hypotheticals in which the term "communist" is laden with unprovable value judgments or abstraction. (See *Milkovich, supra,* 497 U.S. at p. 20, italics added [dictum suggesting "In my opinion Mayor Jones shows his *abysmal ignorance* by accepting the teachings of Marx and Lenin" would be nonactionable]; cf. also *Buckley v. Littell* (2d Cir. 1976) 539 F.2d 882, 887, 893 [book labeling William F. Buckley, Jr., a "fellow traveler" of "fascists" not defamatory because "the use 'fascist,' 'fellow traveler' and 'radical right' . . . cannot be regarded as . . . statements of fact . . . because of the tremendous imprecision of the meaning and usage of these terms in the realm of political debate"].) Here, in contrast, defendant broadcast his "Communist" accusation not in an abstract or literary context but to an audience attuned to any allegiance to communist Vietnam. Because of the implied limitation to the Little Saigon community's experience with Vietnamese communism, the charge tended to be more definite, and therefore more likely to rest on particular, provably true or false implied facts.

Defendant contends that if he called plaintiff a "Communist" he used the term as one uses "epithets which express a speaker's emotions rather than assertions of fact." (*Lasky v. American Broadcasting Companies* (D.C.N.Y. 1985) 606 F.Supp. 934, 940 [no slander where debate participant traded "Communist" and "Nazi" jabs].) Below, defendant pointed to his alleged simultaneous use of the terms "hardcore democrat" and "gay and lesbian lover" as evidence of the heated, political pallor of his comments. We cannot say, however, that "even the most careless" listener would have perceived

defendant's word choice as "no more than rhetorical hyperbole, a vigorous epithet." (*Greenbelt Co-op Pub. Assn. v. Bresler* (1970) 398 U.S. 6, 14.) To the contrary, on the facts presented by the parties for the strike motion hearing, plaintiff showed it was more likely a reasonable listener or jury would find the "Communist" accusation "sufficiently factual to be susceptible of being proved true or false." (*Milkovich*, *supra*, 497 U.S. at p. 21.)

F. *New Arguments Raised for First Time on Appeal*

Defendant contends the privilege embodied in Civil Code section 47, subdivision (b)(1), precludes plaintiff from showing a likelihood of success on her defamation claim. (See *Integrated Healthcare*, *supra*, 140 Cal.App.4th at p. 522 ["If the plaintiff cannot meet this burden, the trial court must strike the cause of action"].) Immunizing statements made "[i]n any . . . legislative proceeding" (Civ. Code, § 47, subd. (b)(1)), the legislative privilege extends to communications outside a particular session if designed to prompt official action. (See, e.g., *Brody v. Montalbano* (1978) 87 Cal.App.3d 725, 732; but see *Frisk v. Merrihew* (1974) 42 Cal.App.3d 319, 324, original italics ["*the absolute privilege attaches only to a publication that has a reasonable relation to the action*" and only "*if it is made to achieve the objects of*" the proceeding].)

Similarly, defendant argues a federal privilege, distinct from the legislative privilege and embodied in the *Noerr-Pennington* doctrine, shields him from suit based on his statements to the Board members. "The *Noerr-Pennington* doctrine protects private parties from tort liability when they engage in the constitutional right to petition the government." (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 108; see U.S. Const., 1st & 14th Amends; see also *Eastern R.R. Conference v. Noerr*

Motor Freight (1961) 365 U.S. 127, 135 ["mere attempts to influence the passage or enforcement of laws" are immune from claims such activity furthered formation of illegal trusts].) The doctrine does not protect statements made with actual malice. (*McDonald v. Smith* (1985) 472 U.S. 479, 485.)

Because defendant failed to raise these defenses below, he has forfeited them as a basis to reverse the trial court's decision on the motion. (See *People v. Mower* (2002) 28 Cal.4th 457, 474, fn. 6 (*Mower*); *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371; *Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316 [party may not assert new theory for first time on appeal].) We review the trial court's rulings for error (Cal. Const., art. VI, § 13), and defendant demonstrates none by raising new arguments on appeal. (See *People v. Partida* (2005) 37 Cal.4th 428, 435 ["A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct"].)

Defendant asserts we should evaluate his new defenses because they may be decided as a matter of law based on undisputed facts. Defendant's premise, however, is unsound. It is inaccurate to characterize the facts as undisputed when plaintiff never had an opportunity to challenge them. The legislative privilege and the *Noerr-Pennington* doctrine are affirmative defenses. (See *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2006) 136 Cal.App.4th 464, 478.) Had defendant raised either defense, he would have borne the burden of proof on each. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 676.) But because defendant failed to raise either defense in his answer or in his anti-SLAPP motion, plaintiff had no notice to develop evidence as required by section 425.16, subdivision (b)(2), to defeat either privilege. In this posture, where defendant's omissions deprived plaintiff of the opportunity to place the facts

pertinent to either privilege in dispute, it would be inappropriate to conclude the facts are undisputed or, consequently, to reach the merits of defendant's claims for the first time on appeal.

G. *Belated Attack on Nondefamation Causes of Action*

The trial court denied defendant anti-SLAPP relief on plaintiff's ninth, tenth, and eleventh causes of action for intentional or negligent interference with contractual relations or prospective economic advantage because defendant did not challenge those causes of action in his strike motion, only his reply. The trial court properly denied defendant relief he did not seek in his moving papers and, again, defendant has forfeited the issue on appeal. (E.g., *Mower*, *supra*, 28 Cal.4th at p. 474, fn. 6.) On the merits, the gist of defendant's challenge is basically that plaintiff could not prove the existence of a binding contract or economic advantage because further negotiations on the details could cause one party or the other to walk away and she therefore failed to prove proximate cause linking defendant's actions with any damages she suffered. But, as noted above, the walk-away scenario is merely speculative. In short, defendant's challenge appears, at best, relevant to the *amount* of damages, which is not a bar to plaintiff's causes of action.

III

DISPOSITION

The trial court's order granting plaintiff leave to amend and thereby effectively denying defendant's motion to strike is affirmed. Plaintiff is entitled to her costs on appeal.

ARONSON, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.